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Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DEC 6 1975
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

DeWITT DISTRIBUTORS, INC., a corporation,

Plaintiff and Respondent,

v.

BOND FURNITURE, INC., dba VRONTIKIS FURNITURE, NICK VRONTIKIS and HELEN W. VRONTIKIS, his wife, ST. NICHOLIS INVESTMENT COMPANY,

Defendants and Appellants.

Case No. 13625

RESPONDENT'S BRIEF

Appeal from the judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah. The Honorable Maurice Harding, Judge.

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FILED
JUL 1 - 1974
Clerk, Supreme Court, Utah

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IN THE

SUPREME COURT

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STATE OF UTAH

DeWITT DISTRIBUTORS, INC., a corporation,

Plaintiff and Respondent,

v.

BOND FURNITURE, INC., dba VRONTIKIS FURNITURE, NICK VRONTIKIS and HELEN W. VRONTIKIS, his wife, ST. NICHOLIS INVESTMENT COMPANY,

Defendants and Appellants.

Case No. 13625

BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This was an action instituted by Plaintiff to collect a promissory note, secured by a trust deed on real property and a lien on personal property, in which the District Court awarded Plaintiff its costs and attorneys fees.

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DISPOSITION IN THE LOWER COURT

The question of the amount of costs and attorneys' fees to be awarded Plaintiff was heard by the District Court on January 25, 1974, and the Court awarded Plaintiff the sum of $1,834.30.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to have the award of the District Court affirmed on appeal.

STATEMENT OF FACTS

On December 8, 1972, Plaintiff instituted action against Defendants to recover the sum of $21,566.08, plus interest, costs and attorneys fees, evidenced by a promissory note and secured by a trust deed on real property and a lien on merchandise of the Defendants. (R. 42-57). Through numerous procedures during the following months, the Plaintiff's attorneys were able to collect the entire principal and interest which was due to the Plaintiff. These procedures included the obtaining of a temporary restraining order and order to show cause (R. 29-30); an agreement for disposal of the merchandise which was the subject restraining order and order to show cause (R. 34-39); an assignment of the proceeds of a real estate contract (R. 40-41); the obtaining of a trust deed covering additional real property (R. 26-28); the obtaining af assignments of insurance proceeds (Exhibits 3-P and 4-P); and a sales agreement (Exhibit 5-P). By March 20, 1973,

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the only matter remaining to be resolved was the amount of costs and attorneys' fees to be awarded Plaintiff in the action. The sum of $1,834.30 was then deposited with the Clerk of the Court to secure the payment of these costs and attorneys' fees (R. 23-24). The Defendants never filed an answer or responsive pleading to Plaintiff's complaint or to any other pleading or motion of Plaintiff in the action, and on June 20, 1973, the default of each of the Defendants was entered. (R. 21)

On January 15, 1974, Plaintiff filed a motion to have the Court set the amount of costs and attorneys' fees to be awarded Plaintiff in the action (R. 12). Notice of this motion was given to Defendants' attorneys (R. 14). On January 25, 1974, Plaintiff's motion came on regularly for hearing before Judge Maurice Harding. The Plaintiff's attorney, Roger J. McDonough, was placed under oath and testified as to the nature and amount of work involved in the action and what he considered to be a reasonable attorneys' fee to be awarded in the action. He was then cross examined by Defendant's attorney, Paul Cotro-Manes. On the basis of the evidence so introduced the Court awarded Plaintiff the sum of $1,834.30 as its costs and reasonable attorneys' fees in the action (R. 8)

ARGUMENT

POINT I

THE ATTORNEYS' FEES IN THIS

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ACTION WERE PROPERLY AWARDED BASED UPON SWORN TESTIMONY AS TO THE AMOUNT OF A REASONABLE FEE TO BE AWARDED IN THE ACTION.

The brief of Defendant-Appellants spends considerable time arguing that it is generally required that evidence be introduced on the question of attorneys' fees. Plaintiff-Respondent agrees entirely with the position of Defendant-Appellants in this regard, and agrees with the cases cited in support of this proposition. It appears clear that in the State of Utah, in the absence of a stipulation, evidence should generally be introduced on the amount of attorneys' fees to be awarded. This is exactly what happened in the instant case.

On January 15, 1974, the Plaintiff filed a motion to have the Court fix amount of costs and attorneys' fees to be awarded in the action. (R. 12) This was the only matter remaining to be resolved in the case. The motion came on regularly for hearing on January 25, 1974, the Plaintiff being represented by Roger J. McDonough and the Defendants being represented by Paul Cotro-Manes. (R. 8). Plaintiff's attorney was placed under oath and testified as to the nature and extent of the work involved in the action and gave his opinion as to the amount of costs and attorneys' fees which should be awarded. He was then cross examined by the Defendant's attorney, Paul Cotro-Manes. Following this testimony and cross examination the matter was sub-

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mitted and the Court awarded Plaintiff the sum of $1,834.30.

Nowhere in Defendant-Appellant's brief is it asserted that Plaintiff's attorney was not sworn, did not testify under oath on the matter of attorneys' fees or was not subjected to cross examination. The Defendant-Appellants admit at page 2 of their brief that Plaintiff's attorney did testify as to the legal services performed in the matter. This evidence so introduced, complied fully with the directive of the Supreme Court as to the procedure to be followed in awarding attorneys' fees.

The Defendant-Appellants appear to assert, however, that six documents which were exhibited to the Court during the testimony of Plaintiff's attorney were not formally introduced in evidence, and that therefore no evidence was introduced.

The specious nature of this argument deserves little comment. The testimony of Plaintiff's attorney *was* introduced in evidence. This is the only type of evidence that is required. There never has been a doctrine in this state that the amount of an award for attorneys' fees must be established by documentary evidence as opposed to sworn testimony. In fact, it is sworn testimony, and not documentary evidence, that is employed in almost every case to establish the amount of an award for attorneys' fees.

The six documents in question which were exhibited to the Court during the course of the testimony were

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merely demonstrative of the work performed by Plaintiff's attorney which was not shown by the record already on file in the action. The unchallenged pleadings themselves were replete with other evidence of the work performed by Plaintiff's attorneys in the case. Illustrative of this work were the temporary restraining order and order to show cause (R. 29-30); the agreement for disposal of the merchandise (R. 34-39); the obtaining of the assignment of the proceeds of the real estate contract (R. 40-41); and the obtaining of a trust deed covering additional real property (R. 26-28).

The procedure which was adopted in this case in establishing the amount of attorneys' fees to be awarded is the procedure outlined in the concurring opinion of Justice Ellett in the recent case of *Hatch v. Sugarhouse Finance Company,* 20 U.2d 156, 434 P.2d 758 (1967). Plaintiff's attorney was sworn, testified as to the nature and extent of the work performed in the action, and was cross examined by Defendants attorney. The matter was then submitted to the Court and the Court executed an order stating that evidence was introduced and that Plaintiff was to be awarded the sum of $1,834.30 for its costs and reasonable attorneys fees in the action.

POINT II

THE FACT THAT NO STENOGRAPHIC REPORT OF THE PROCEEDING WAS MADE OR IS AVAILABLE

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DOES NOT ENTITLE DEFENDANT-APPELLANTS TO A REVERSAL OF THE AWARD WHERE DEFENDANT-APPELLANTS HAVE MADE NO ATTEMPT TO COMPLY WITH RULE 75 (m) UTAH RULES OF CIVIL PROCEDURE.

The Defendant-Appellants do not claim that the testimony taken in this matter was insufficient to sustain the award of attorneys' fees in this case. They do not point out one scintilla of testimony or evidence in support of the proposition that some lesser or different award should have been made or that the award which was made was excessive, or was an abuse of the Trial Court's discretion. What the Defendant-Appellants do claim is that no stenographic report of the testimony was taken or is available. They claim, therefore, that it must be presumed that the testimony did not support the award, that the award is excessive, or that the trial court abused its discretion, and the award of costs and attorneys' fees must be reversed. It is respectfully submitted that this is not the law.

The Utah Rules of Civil Procedure specifically contemplate that situations may arise in which no stenographic report of proceedings was made, or is available. In such situations the case is not simply reversed or remanded at the request of the appellant. Such cases are governed by Rule 75(m), Utah Rules of Civil Procedure, which provides as follows:

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> "(m) *Appeals When No Stenographic Report Available.* In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, or is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the respondent who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal."

The right to prepare such a statement of the evidence and proceedings pursuant to Rule 75(m) is granted to the appellant. There is no similar rule granting such a right to a respondent, the respondent's sole right being to object to the appellant's statement and propose amendments thereto.

In the instant case, if Defendant-Appellants thought that there was anything at all in testimony which indicated that the award in question was excessive or that the trial court abused its discretion, the attorney for Defendant-Appellants could have prepared a statement of such testimony, based on his own recollection, and have thereby afforded the Supreme Court the opportunity to determine whether or not the testimony

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was sufficient to sustain the award. This, of course, the Defendant-Appellants have failed to do.

Rule 75(m) of the Utah Rules of Civil Procedure is identical to Rule 10(c), Federal Rules of Appellate Procedure (formerly Rules 75(n) Federal Rules of Civil Procedure.) This Federal Rule was construed in the case of *Murphy v. St. Paul Fire & Marine Insurance Company,* 314 F.2d 30 (5th Cir. 1963) in a situation quite similar to the one involved in the instant case.

In the *Murphy* case a portion of the reporter's recording discs were destroyed, and consequently, portions of proceedings in the trial court were not available as a part of the record on appeal. In the *Murphy* case as in the instant case, the appellant contended that the case must be remanded for a new trial because of the unavailability of the transcript of that portion of the proceedings in which error was claimed to have occurred. In the *Murphy* case, as in the instant case, the appellant made no effort to supply the record through Rule 75-(n). The appellate court refused to order a new trial and affirmed the decision of the trial court. The appellate court stated:

> ". . . It is elementary that the burden is on the appellants to show error. *CF. Strachan Shipping Co. v. Alexander,* 5 Cir., 1962, 311 F.2d 385.
>
> The appellants have not availed themselves of the provisions of Rule 75(n), F.R.-C.P., a procedure which might well have

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> enabled them to bring a sufficient record before us. *CF. Cadby v. Savoretti,* 5 Cir. 1956, 242 F.2d 751 and *Herring v. Kennedy-Herring Hardware Co.,* 6 Cir., 1958 261 F.2d 202. In the absence of compliance with the Rules, the charges urged to be erroneous are not in the record and not before us. *Browder v. United States,* 5 Cir., 1961, 292 F.2d 44, 49."

Where evidence or proceedings in the lower court were not transcribed, or where the stenographic transcript is not available, the appellant cannot obtain a reversal unless he at least makes an attempt to comply with Rule 75(m). The following excerpts from 9 Moore, Federal Practice §210.66 at pages 1629-1631 set forth the law in this regard:

> "The stated purpose of original Civil Rule 75(n), analogue of present Rule 10(c), was to provide 'a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings.'
>
> * * *
>
> 'If it is necessary to add to the record parts of the evidence or proceedings which were not recorded by the reporter, the provisions of Rule 10(c) must be followed. Bare recitals of counsel as to what transpired are not enough.' "
>
> * * *
>
> "Since Rule 10(c) does provide a method

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> of including in the record proceedings and evidence that do not appear in the reporter's transcript, a party may not seek a new trial simply on the ground that matters that occurred in the district court are not reflected in the transcript. He must at least make an effort to supplement the record by proceeding under Rule 10(c)."

In the instant case no stenographic transcript of the testimony in question was apparently made or is available. This does not entitle appellant to a reversal or a new trial where he has made no attempt whatsoever to provide such testimony, through his attorney's best recollection, pursuant to Rule 75(m). If Defendant-Appellants in fact believe that the testimony was insufficient to sustain the award, they should supply such testimony as they feel will sustain their position as provided by Rule 75(m). The Defendant-Appellants have the burden of establishing that the testimony taken did not support the award. They have failed completely to sustain this burden through their failure to point out to this Court through the use of Rule 75(m), in what respects the testimony was deficient.

POINT III

FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT REQUIRED IN THE INSTANT CASE.

Defendant-Appellants' final contention is that the

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award in the instant case must be reversed because no findings of fact and conclusions of law were made in the instant case. However, the Utah Rules of Civil Procedure and the record in this case show that no findings of fact and conclusions of law were required. Rule 52 (c) Utah Rules of Civil Procedure states:

> "(c) *Waiver of Findings of Fact and Conclusions of law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:
>
> (1) By *default* or by failing to appear at the trial; . . ." (Emphasis added)

Where the defendants have failed to answer or otherwise plead to the Plaintiff's complaint, and their default has been entered, no findings of fact or conclusions of law are required in order to sustain the judgment or award. Such defaulting Defendants are not even entitled to notice of any further proceedings in the action. (Rule 55(a)(2), Utah Rules of Civil Procedure).

In the instant case the Defendants were all served with summons and verified complaints on December 8, 1972 (R. 15-20). None of the Defendants ever filed any answer or other adverse pleading in the action and on June 12, 1973, the default of all Defendants was entered. (R. 21) No motion was ever made to have the default of the Defendants set aside. Six months after the Defendants' default was entered, the hearing was

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held to fix the amount of attorneys' fees in the action. At that time the default of the Defendants continued, and still continues up to the present time. Under these circumstances, no findings of fact or conclusions of law are required.

In the instant case the defendants waived findings of fact and conclusions of law by their default in the action. A party who thus waives the making of findings of fact and conclusions of law cannot thereafter take advantage of his default, and complain that no findings of fact were made. In such circumstances the Supreme Court will not review the facts but will assume that the trial court found them to be such as to sustain his award. *Farrell v. Turner,* 25 U.2d 351, 482 P.2d 117 (1971); *Mower v. McCarthy,* 122 Utah 1, 245 P.2d 224 (1952).

CONCLUSION

In the instant case the Defendants failed to answer or otherwise plead to Plaintiff's verified complaint and their default in the action was entered. By their failure to answer, the Defendants admitted the allegations of the complaint, including their execution of the note and trust deed which provided for the payment of attorneys' fees. By their default they also waived findings of fact and conclusions of law and waived the right to receive notice of any further proceedings in the case.

In spite of the fact that they had waived the right to receive notice of a hearing to fix the amount of attorneys' fees, notice of the hearing was given to De-

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fendants by Plaintiff. At the hearing, the Plaintiff's attorney was sworn and testified on the matter of attorneys' fees. He was then cross examined by Defendants' attorney. At the conclusion of the hearing the matter was submitted and the Court awarded Plaintiff the sum of $1,834.30.

The fact that no stenographic report of the hearing was made, or is available is not grounds for reversing the decision of the trial court. If the Defendants actually believe that the testimony given was insufficient to sustain the award, they have the burden of establishing such insufficiency. Rule 75(m) of the Utah Rules of Civil Procedure provides that in such circumstances, the Appellants must prepare a statement of the evidence and proceedings in lieu of the stenographic transcript. Such a statement supporting the alleged claim of insufficiency would have been a simple document to prepare. It could have been based solely on the recollection of Appellants' attorney as to what took place at the hearing. The Appellants never attempted to prepare such a statement.

The actions of the Defendant-Appellants in this case has been one of continuous default. They defaulted in making their payment of the promissory note and this necessitated the institution of the action. They defaulted in answering or otherwise pleading to the verified complaint, thereby admitting the allegations of the complaint, and waiving findings of fact and conclusions of law and notice of any further proceedings in the case.

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They defaulted in preparing the statement of evidence and proceedings required by Rule 75(m) Utah Rules of Civil Procedure, thereby failing to sustain their burden of establishing that the testimony given at the hearing was insufficient to support the award. The Defendant-Appellants should not be permitted to harvest a benefit sown from the seeds of their own numerous defaults.

It is respectfully submitted that in the instant case, the Supreme Court must assume that the Trial Court found the facts to be in accordance with its award, that the testimony supported the award and that the decision of the trial court must be affirmed.

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